might direct. The question of coal involved a large sum of money. No argument or discussion was directed to the point. The coal was not requisitioned. The plaintiffs said that the coal without the ships was worth very much less than the coal with the ships. Unwittingly, he thought, the declaration regarding the coal would seem to prejudice the matter. He merely wished to find out the intention of the Court. If it was merely a slip, the position could be met by merely striking out declaration 2 and numbering declaration 3 declaration 2. It would then be a point whether this loss in respect of coal was really a damage by the requisition of the ships.

Mr. Roland Braddell agreed to this course.

His Lordship corrected the judgment accordingly.

Solicitors for the Plaintiff—*Braddell Bro-*
Solicitors for the Defendants—*Drew & Napier.*

[APPELLATE CIVIL JURISDICTION]

PRITCHARD, J.,
STEVENS and DINSMORE, JJ.
September 2, 1929.

LAU TAI THYE *alias* LAU TAI TAI *alias* LAU THYE THYE *alias* TAI THYE..Plaintiff.
(Respondent)

and

LEONG YIN KHEAN & OTHERS.....Defents.
(Appellants)

[PENANG CIVIL APPEAL No. 11 of 1927]

Administration—claim for declaration of Status as secondary wife and for share in widow's one-third share on intestacy—laches and long acquiescence — limitation — Ordinance No. 56 (Limitation), Art 97.

The plaintiff-respondent claimed to be one of the secondary wives of a Chinese gentleman named Cheang Ah Quee who died in 1901. In certain proceedings instituted in 1912 it was declared that there was an intestacy as to certain parts of the income of the deceaseds estate. In 1915 the Registrar, acting under an Order of Court directing an inquiry as to the deceased's next-of-kin, made his certificate and found four persons entitled to rank as widows of the deceased. There was no mention of the respondent's name in the certificate. There was no mention of the respondent's name in the certificate. It appeared from the evidence that the plaintiff-respondent must have known by the end of 1915 that her claim was being canvassed and that the Courts of the Straits Settlements were prepared to entertain claims by secondary wives of the deceased. At the end of 1919 one Tan Ah Loy who also claimed to be a secondary wife of the deceased succeeded in establishing in the Privy Council her right as such to a distributive share in his estate. The plaintiff-respondent, however, took no steps whatever to put forward her claim until the year 1924 long after the funds of the estate had been distributed.

Held, by the Court of Appeal (Prichard Stevens, JJ., Dinsmore, J. dissenting) that the plaintiff-respondent was debarred by laches and long acquiescence from prosecuting her claim.

Held further, that the claim being *imprimis* one for a declaration of status as a secondary wife, the suit fell within the terms of Article 97 of the Schedule to Ordinance No. 56 (Limitation), and was barred because it had not been brought within 6 years from the date when the claim might have been preferred.

APPEAL from the Judgment of Sproule, J., dated the 2nd September, 1927, declaring that the plaintiff-respondent was a secondary wife of Cheang Ah Quee deceased and entitled to share in the widow's one-third share of income as to which the deceased died intestate, as from the 6th August, 1912.

The facts appear from the Judgment of Stevens, J. and for the purposes of this report may be sufficiently gathered from the head-note.

Terrell for 1st—4th Appellants.
Saunders for 5th Appellant.
J. Crabb-Watt for Respondent.

The Court of Appeal (Prichard, J., Stevens & Dinsmore, JJ.) unanimously allowed to appeal and proceeded to deliver the following written Judgments thereon later.

6-12-1929

PRICHARD, J.—In this appeal the Court in a verbal judgment agreed with the finding of the learned Judge that the Respondent had been a lawful secondary wife of Cheang Ah Quee deceased and that she was consequently now one of the lawful widows, but it considered that her claim was barred by the Limitation Ordinance and by acquiescence.

Cheang Ah Quee died on the 13th December 1901 and an intestacy as to certain portions of the income of the estate was declared in Suit No. 261 of 1912. On the 5th June 1914 an inquiry was ordered as to the testator's next of kin, and on the 27th June 1914 a notice was published in the local newspapers directing that all claimants should attend and prove their claims on the 25th August 1914.

Section 976 of the Civil Procedure Code enacts:—

> "Where a judgment or order is given or made, whether in Chambers directing an made, whether in Court or in Chambers directing an account of debts, claims, or liabilities, or an inquiry for next-of-kin or other unascertained persons, unless otherwise ordered all persons, who do not come in and prove their claims within

The cases of *Then Kang Chu* v. *Tan Kim Hoe*, (1926) S.S.L.R. 1 and *Meyer* v. *Meyer*, (1926) S.S.L.R. 24, appear not to have been cited. The report however is considered of sufficient interest for publication on the questions of laches and limitation.

the time fixed for that purpose by advertisement, shall be excluded from the benefit of the judgment or order."

The Registrar's Certificate was issued on the 24th December 1915. In that certificate no mention is made of the Respondent. Her correct procedure would then have been that laid down in Section 988 of the Code of Civil Procedure, which provides—

"After the time fixed by the advertisement no claim shall be received, unless the Judge at chambers thinks fit to give special leave, upon application made by summons, and then upon such terms and conditions as to costs and otherwise as the Judge thinks fit."

She could have applied for special leave and claimed to be a secondary wife. But she took no action till the 6th August 1924 when she instituted the present suit.

Without going so far as to hold that her non-adoptfon of the procedure laid down in Section 988 preludes her from bringing this action, yet legally she cannot now be in a more advantageous position than if she had followed the procedure specified in the Code.

From correspondence which passed between Messrs. Hastings and Hastings of Hongkong, the Solicitors for the principal widow and their Penang Agent, Mr. Wright-Motion, in December 1915, it appears that the Respondent's claim "had always been" put forward, and in her cross-examination in the present case she stated that the Solicitors for trustees had at one time supported her claim. Again in her examination-in-chief she said she knew she had a claim against her husband's estate since her son made a claim against the trustees. This can only refer to the Hongkong suit commenced by her alleged son in 1918. Therefore she knew she had a claim certainly as early as 1918, and in all probability in 1915. Under these circumstances I am of opinion that her claim is barred by Article 97 of the Schedule to the Limitation Ordinance.

The Respondent's claim is substantianlly one for a declaration of relationship to a deceased person, and in India suits of this nature have been held to come within Article 120 of the Indian Enactment which is the equivalent of our Article 97. It fixed 6 years as the period of limitation. Thus in *Mahomed Riasat Ali* v: *Hasin Banu* (I.L.R. 21 Calcutta 157), a widow sued for a declaration of her right of inheritance in her deceased husband's property which she alleged had been taken possession of by his brother. In the Judgment of the Privy Council at page 163 it is stated:—

"This is not a suit for a distributive share of property (art. 123), not a suit for specific moveable property wrongfully taken (art. 49).
This latter article does not appear to be applicable to a suit to establish a right to inherit the property of a deceased person. Art. 120 provides a period of limitation of six years for a suit for which no period of limitation is provided elsewhere in the Schedule. Their Lordships think this article should be applied, unless it is clear that the suit is within some other article, which in their opinion it is not, and consequently the suit as regards the moveable property is not barred."

There are many similar cases e.g. I.L.R. 15, Bombay 422. Apart from the defence of limitation it would seem that the Respondent has been guilty of such laches as debars her from prosecuting her claim. In *Mohan* v. *Broughton*, (1899) P. 211, it was said by Gorell Barnes, J., at pages 218 and 219—

"It is clear that there is a broad distinction between the position of a person who had no notice of the proceedings in an administration suit in which a fund has been distributed, and who upon becoming aware of the facts, seeks to make the recipients of the fund refund, and that of a person who with notice of such proceedings and with knowledge of the questions which can be raised therein, neglects to contest the the matters upon which his rights, if any, depend, and allows the fund to be distributed; and then, after a time, seeks to reopen the whole matter.
"In the one case, the claimant has done nothing which ought to affect his rights against the recipients; whereas, in the second, it would, in my opinion, be inequitable to allow him to come forward and compel the recipients to refund, after he has lain by and allowed them to act upon the belief that the fund has been properly distributed among them and when there is little or no doubt that their positions and obligations have been affected by acting, as they apparently would be entitled to do, in such belief."

In our case the Respondent must have known in 1915 that her claim had been put forward and rejected.

It is suggested that she or her advisers were waiting to see what view the Court would take of the position of another lady Tan Ah Loy, whose case was exactly similar to the Respondent's. The Privy Council judgment in *Tan Ah Loy's* case

is dated the 5th November, 1919 and is reported in (1920) A.C. 369. It decided that Tan Ah Loy was a lawful widow of the deceased. It does not appear to me that the Respondent has given any real explanation of her further delay of over 4 years and under these circumstances I consider that it would be inequitable to call for a refund of funds distributed so many years ago.

The Appeal is allowed, the costs of the Respondent and of the trustees to be paid out of the corpus.

2-9-1929.

STEVENS, J.—The respondent instituted a suit on 6th August, 1914, and by her Statement of Claim asked for a declaration that she was a *t'sip* or secondary wife of one Cheang Ah Quee, deceased, and on his death became one of his lawful widows and as such entitled to a share of the property as to which he died intestate; also for payment of what is due to her on declaration of the intestacy.

By the judgment, dated 22nd September, 1927, the declaration of relationship asked for was made, and it was ordered that respondent was entitled to share in the widow's one-third of income as to which the deceased died intestate as from 6th August, 1912.

Against this judgment the appellants have appealed.

The testator died on 13th December, 1901 and it was declared in Suit No. 361 of 1912 that there was an intestacy as to certain portions of the income of his estate. Accordingly, on 5th June, 1914 an order was made directing an inquiry as to the testator's next-of-kin. On 27th June, 1914 a notice was published in a Penang paper, the Straits Echo, directing all persons who claimed to be next-of-kin of the deceased to attend and prove their claims on 25th August, 1914. On 24th December, 1915 the Registrar made his certificate in which he found four persons to be entitled to rank as widows of the testator and disallowed the claim of one Tan Ah Loy who claimed to have been a secondary wife. The certificate (with a variation)) was confirmed on 10th January, 1916 by Sproule, J. Tan A Loy appealed and on the 26th August, 1916 her appeal was allowed by the Court of Appeal. On the 5th November, 1919 His Majesty's Privy Council dismissed an appeal from the order of the Court of Appeal, and Tan Ah Loy's position as a widow of the deceased became finally established.

The suit by the present respondent therefore endeavours to re-open a question that was decided by the Registrar's certificate of the 24th December, 1915. It was contended on behalf of the appellants that respondent's claim was barred by her laches and acquiescence in the decisions of 1915 anl 1916: and also by the operation of Ordinance No. 56 (Limitation). Section 976 of the Civil Procedure Code provides that on an inquiry for next-of-kin 'all persons who do not come in and prove their claims within the time fixed for that purpose by advertisement, (In this case the 25th August, 1914), shall be excluded from the benefit of the judgment or order.' Section 988 of the same Code provides that "after the time fixed by the advertisement no claims shall be received, unless the Judge at Chambers thinks fit to give special leave, upon application made by Summons, and then upon such terms and conditions as to costs and otherwise as the Judge thinks fit." It would seem, therefore, that the proper course for the respondent to have taken would have been to apply under section 988 for special leave to prefer a claim to be one of the deceased's widows, and to have the certificate varied. In my opinion the respondent by adopting the course of instituting a new action for a declaration of her relationship can at least be in no better position than if she had followed the procedure indicated by section 988. The first question to be considered, therefore, is whether and on what grounds respondent explains her very remarkable delay in putting forward her claim.

The evidence of the respondent herself did not address itself very clearly to such an explanation. She stated, at the conclusion of her examination-in-chief that she first learnt that she had a claim against her husband's estate "in the last few years" and added that she had known since her son claimed against the trustees. This is clearly a reference to the Hongkong suit commenced in 1918 in which a person alleged to be her son claimed administration of the trusts of the will and payment of what was due to him under the provisions of the will; and it fixes the respondent's knowledge of her claim at least as early as 1918. Further, at the conclusion of her cross-examination, she stated that she heard that the Solicitors for the trustees, (who also apparently acted for the principal widow, Lim Ah Chen) had at one time supported her claim. This would appear to have reference to the period towards the end of 1915 and the beginning of 1916 and certain correspondence has been put in evidence which throws a light on her statement. Thus, on the 15th December, 1915, Messrs, Hastings and Hastings of Hongkong, who were then acting for the principal widow, instructed their Penang agent, Mr. Wright-Motion, that, in addition to the claimants whose claims were being contested before the Registrar, there was another concubine entitled to share with the rest, namely, the present respondent, the mother of Cheang Thye Gan. They stated that this lady was then living at Hongkong and was entitled in Chinese law to rank as a lawful secondary wife, and instructed Mr. Wright-Motion to put forward a claim on her behalf. On the 28th December, 1915 Mr. Wright-Motion replied that the respondent had always been 'put forward' (in the same way as Ah Loy) as a concubine; that it would be

very difficult to re-open the certificate to put forward claims; and that if Tan Ah Loy had been ruled out as a concubine (as opposed to a secondary wife), how could the respondent possibly hope to succeed?

This advice appears to have discouraged those responsible for putting forward the claim of the respondent. This inference is confirmed by the extract from the opening of Mr. Potter, who appeared for the defendants in the Hongkong case. Mr. Potter stated that in December, 1915 his clients instructed Penang to put forward a claim on behalf of the respondent and that the reason why respondent's claim was not put forward in Penang was the receipt of Mr. Wright-Motion's letter of the 28th December, 1915, above referred to.

The attitude of Lim Ah Cheng, the principal widow, as it appears from the correspondence exhibited to Mr. Wright-Motion's affidavit, was that she wished, if possible, to be declared the sole lawful widow of the deceased, but if that claim should be unsuccessful, she was in favour of supporting the claim of the respondent as one of the secondary widows. It appears that at that time the respondent allowed the trustees and the principal widow to represent her interest and that they did so; it is clear she was on familiar terms with the people in the family house in Hongkong.

It would appear from all this that respondent, at the end of 1915, must have known that her claim was being canvassed, and that the Courts of the Straits Settlements were prepared to recognize the claims of secondary wives; and that she made no effort to prosecute her claim after the initial failure of the claim of Tan Ah Loy.

Even if this is not a fair inference from the evidence it can at least be contended against the respondent that she has not explicitly denied knowledge of what was going forward at the end of 1915; and she made no serious effort to establish that she was ignorant until a much later date that she had at least an arguable claim to be admitted as a widow.

Her action in bringing this suit would appear therefore to be explicable by reference to the ultimate success of Tan Ah Loy in the Privy Council appeal at the end of 1919. Even on that assumption she has been guilty of further delay of more than four years, which is not satisfactorily accounted for.

These circumstances appear to establish against her a case of long acquiescence. In the case of *Mohan* v. *Broughton* (1899) P. 211. the plaintiff issued a Writ in June 1898 claiming revocation of letter of administration granted in December, 1892, the object of the proceedings being to attempt to recover funds which had been distributed in 1894. It appears that in 1894, when administration inquiries had been in progress, she had preferred a claim in those proceedings on the same ground of alleged relationship to the deceased as that on which she based her action in 1898; but that she had abandoned her claim because she was unable to establish it. The Court held in those circumstances that the plaintiff had acquiesced in the Chancery proceedings which had culminated in the distribution of the estate, and had been guilty of such laches as disentitled her to maintain as against those who had shared the estate a suit to compel them to refund their shares; and that, as the ultimate object of her suit for revocation was the recovery of the distributed funds, to which her laches would disentitle her, the Court ought not to assist her to obtain a grant which would be useless to her. In giving judgment Gorell Barnes, J., stated (p. 219) that "it would be inequitable to allow (a claimant) to come forward and compel the recipients to refund, after he had lain by and allowed them to act upon the belief that the fund had been properly distributed among them, and when there was little or no doubt that their positions and obligations had been affected by acting, as they apparently would be entitled to do, in such belief." Well established principles and the authority of this case would seem to be fatal to the respondent's right to a declaration so far as the object of that declaration is (as it is expressed to be) to compel a refund of funds distributed since 1912—and I am disposed to the view that the respondent's failure to prosecute her claim in 1915 should now debar her from claiming a share in undistributed income to which the persons included in the certificate of December, 1915 have so long considered themselves to be solely entitled.

But it is not necessary to consider this aspect of the case, for in my opinion this suit is barred by limitation. It was contended on behalf of the respondent that the suit came within the provisions of Article 99 of the Limitation Ordinance. That article provides that, in a suit for a legacy or for a share of a residue bequeathed by a testator or for a distributive share of the property of an intestate, the limitation period shall be 12 years from the time when the legacy or share became payable or deliverable. Now the property to which the widows and next of kin in this case became entitled on the intestacy consists of a share of the income of the estate, as it accrues from time to time over a long period until the date assigned for the distribution of the corpus. It follows therefore, that, in respect of each instalment of the income, a fresh period of limitation begins from the time at which it becomes already payable when the respondent instituted her suit, she would if this article applied, be entitled to recover all that had become payable within the 12 immediately preceding years. As to any income not already payable at the time when the suit was instituted, it is clear

that no question of limitation could possibly arise. I have given reasons for my view that the respondent cannot now recover, either from the trustees, or from the persons whose claim to rank as widows and next of kin has already been allowed, any share of income already distributed. But Article 99 cannot operate to prevent the respondent from establishing a claim to a share of future income. If her suit is within that article, no limit is placed on the time within which she may come in and establish her right to rank as a widow.

In my opinion however this suit is *imprimis*, a suit for a declaration of the respondent's status. Her claim to any share of income, whether it is already payable or not, is a consequential claim founded on the establishment of her status. Each instalment of income, if it were withheld by the trustees, might be made the subject of a suit at any time within 12 years from the time when it became payable; but the period within which the respondent may be permitted to establish her status cannot be fixed by reference to the period within which, her status once established, she may sue for any instalment of income withheld. There is in my opinion no article which specifically covers a claim by a plaintiff to establish her status as the widow of a deceased person, and recourse must therefore be had to Article 97, which assigns to any suit for which no period of limitation is provided elsewhere in the schedule a period of 6 years from the time when the right to sue accrued. This article has been applied by the Indian Courts to numerous cases where a plaintiff has sought to establish status or relationship, of which the case reported in I.L.R. 15, Bombay, p. 422, is a good example. Another case is that of *Md. Riasat Ali* v. *Hasin Banu*, (21 Calcutta, p. 157), where a widow sued for a declaration of her proprietary right in the property left by her deceased husband, alleged to have been taken by his brother, the defendant, and an order for possession. The property consisted of moveables and immoveables. There was an alternative claim to inherit one quarter of the property under Mohamedan law. So far as the moveables were concerned it was argued that the suit fell within Article 49, as being for specific moveable property wrongfully taken. So far as the claim as a whole was concerned it might have been held to come under Article 123, corresponding to our Article 99. The Privy Council held that a suit *to establish a right* to inherit a deceased person's property came within Article 120, corresponding to our Article 97.

In my opinion this suit is barred because it has not been brought within 6 years from the date when the claim might have been preferred. It is not necessary to decide whether that date should be taken to be the date when the intestacy was decreed, or when the inquiry gave an opportunity of putting forward her claim; for in any case that period had long expired.

For these reasons I was of opinion that this appeal should be allowed.

I may add that, on the facts of the case, I should not be disposed to hold that the finding of the learned trial Judge was unwarranted.

17-12-1929.

DINSMORE, J.—Plaintiff's main claim in this case, and in fact the only claim that is now under consideration, is for a declaration that she was a *t'sip* or secondary wife of Cheang Ah Kwee, deceased and on his death became a lawful widow. In 1891 Cheang Ah Kwee had a principal wife, Lim Ah Chen living in the family house in Hongkong. He had also by a subsequent marriage another wife Tan Gek Im in Penang, who by Malayan Chinese custom—but not according to strict Chinese law—was also regarded as a principal wife, and who lives in a family house (so called by the Malayan custom) in Penang. It is clear however that according to Chinese ideas Lim Ah Chen was the important wife. In 1891 plaintiff joined Cheang Ah Kwee. Whether any ceremony was performed or not or whether any document was drawn up or not, I do not find it necessary to determine. There is a certain amount of evidence and a great deal of suggestion that she was not received in the Penang family house owing to the jealousy of Tan Gek Im who refused her. No definite finding here appears necessary, but this point should be borne in mind in view of subsequent developments. Plaintiff was provided with a separate house by Cheang Ah Kwee in which she lived until 1901. In 1893 she bore Cheang Ah Kwee a son, Cheang Thye Gan who died a few years later; but this birth according to Chinese ideas greatly strengthened her claim to be regarded as a secondary wife. Special provision was made for Cheang Thye Gan by Cheang Ah Kwee in his Will. In 1901 Cheang Ah Kwee sent Plaintiff in charge of his third son Cheang Tai Yin, who was also a son of Lim Ah Chen, to the family house in Hongkong which was under Lim Ah Chen's supervision. The inference suggested by the Plaintiff that this was done in order to legalise her position as a secondary wife, as Tan Gek Im in Penang refused to receive her, is of considerable weight. A woman named Hong Swee Lin, who was at that time the wife of one of Cheang Ah Kwee's employees and was living with her husband in the family house, described what occurred on Plaintiff's arrival as follows:—

> "Last witness (i.e. Plaintiff) was received with ceremony. She laid tea before the ancestors first and worshipped them in the presence of Lim Ah Chen. Then last witness (Plaintiff) offered a cup of tea on her knees to Lim Ah Chen who accepted it, and gave her a new name

'Pek Chong' or 'Kek Chong." It was just formal and the name was never used later. These are the usual ceremonies for reception of a subordinate wife into the family house. I was present throughout. They are followed by homage to last witness (i.e. Plaintiff) by the sons. Last witness lived in the family house thereafter and was always treated as a *t'sip* or secondary wife. . . . . Last witness took part in all the festivals and ceremonies as a *t'sip*."

Plaintiff's account of her reception is similar to above. Thereafter Plaintiff lives in the family house continuously for about 16 years. On the 9th April 1914, the Court of Appeal declared an intestacy as to certain shares of income. As a consequence Ebden, J., on the 22nd May 1914 directed an inquiry as to who were the next of kin of the testator. In this inquiry Penang Suit 361 of 1912 one Tan Ah Loy put in her claim to be declared a former secondary wife and now a lawful widow of Cheang Ah Kwee and as such to be entitled to a share in the intestate estate. The trustees including Lim Ah Chen opposed this claim, their Penang Solicitor being Mr. Wright-Motion and their Hongkong Solicitors Messrs. Hastings and Hastings. The enquiry in Suit 361 of 1912 continued at intervals until 28th December 1915 when the Registrar gave his certificate therein which was confirmed by the Judge on 10th January 1916. When this inquiry was still continuing, on 15th December 1915 Messrs. Hastings and Hastings wrote to Mr. Wright-Motion as follows:—"We are further instructed that there is another concubine who will be entitled to share with 2, 3 & 5 (other widows) namely Lay Sye who apparently is the same person as Tai Tye and is the mother of Cheang Thve Gan who is mentioned in the Will of deceased. This lady who is only living in Hongkong was married as a concubine and is entitled in Chinese law to rank as a lawful secondary wife. . . . Our clients wish you to put forward a claim on her behalf."

This appears to me a clear admission that Plaintiff at that time was regarded by Lim Ah Chen and other Hongkong trustees as a lawful widow. Concerning Tan Ah Loy's claim in Suit 361 of 1912 the Registrar who is a Chinese scholar and had served in the Chinese Protectorate found that Chan Ah Loy was a *t'sip* or secondary wife although no ceremony had been performed. In the present case there is only one witness as to custom, Leong Pin Kam, but his evidence is of the greatest value for two reasons:—(1) He has been 27 years in Government service as an Interpreter and has served in the Chinese Protectorate, (2) He gave evidence as to this custom also in the Tan Ah Loy case and so his evidence there was subject to the scrutiny both of the Court of Appeal and of the Privy Council, and such evidence has now been on record for 13 years. There is moreover no other evidence of custom on record. This witness stated:—"There may or may not be ceremonies for taking a *t'sip*. A *t'sip* at the first time of meeting the principal wife must *kowtow* and offer her a cup of tea. In return the principal wife will accept the tea and give the *t'sip* a name. Before this reception the *t'sip* must pray to the ancestors." All these ceremonies whether necessary or not, were performed by Plaintiff in 1901 at the Hongkong family house. I hold therefore that from the time onwards, if not previously, she became a *t'sip* or secondary wife of Cheang Ah Kwee.

Defendant No. 5 however has pleaded that plaintiff claim is barred by Ordinance No. 56 (Limitation). It is necessary to examine in some detail therefore what plaintiff's claims are They are set out in the statement of claim as follows:—

(1) For a declaration that plaintiff during the lifetime of Cheang Ah Kwee deceased was a *t'sip* or secondary wife of the said Cheang Ah Kwee deceased and on his death became a lawful widow of the said Cheang Ah Kwee deceased and is entitled to share in the widows one third of the property of the said Cheang Ah Kwee deceased in respect of which there was an intestacy.

(2) For ascertainment of what is due to her as such *t'sip* secondary wife or concubine out of the widows one third (This is in effect a prayer for accounts, Intd. W.H.D.)

(3) For payment to her of what is due to her with interest from the date of the declaration of intestacy.

Now it is at once apparent that this suit is clearly divided into two parts: (1) A declaration that plaintiff was a secondary wife and on Cheang Ah Kwee's death became his lawful widow and as such entitled to share; and (2) A further claim for payment of such share, when ascertained. These two claims must be considered and treated separately. The main claim in this case on which everything else depends, including claims 2 & 3 is claim—

(1) For a declaration that plaintiff was a secondary wife and is now a lawful widow.

Claims 2 & 3 do not even arise until this primary claim is established, and so are merely consequential and ancillary thereto. This whole case has been contested over claim (1) and claims (2) & (3) have been scarcely mentioned. Certainly the only matter before this Court at present is claim (1): For a declaration.

I shall now consider which is the appropriate article in the Limitation Schedule applicable to such a claim. Defendants submit that it is

Article 97 (Indian Art. 120), which submission I shall examine in detail later. Article 97 is subject to one limitation, thus stated by Rustomji in his Law of Limitation (I always refer to 4th Edition) p. 581 last line: "Article 120 should never be invoked if there is any other article in the Schedule, which upon reasonable interpretation of its language, seems to cover the particular Suit with which the Court is dealing." Plaintiff has submitted that either Article 99 or Article 100 particularly applies and so I shall examine each in detail.

Article 99: "For a legacy or for a share of a residue bequeathed by a testator or for a distributive share of the property of an intestate . . . . twelve years." Rustomji comments on the exactly similar Indian Article 123 from pages 596 to 605, and quotes numerous Indian decisions. It is remarkable that in none of the many cases quoted, is the status of the claimant, whether as legatee, heir, widow or otherwise a beneficiary, ever disputed or in question; it is apparently always accepted and taken for granted. These cases wholly or mainly turn on the question as to who can be properly sued or as to the time from which limitation runs and kindred questions. If suits for a declaration of status fell within the scope of this article it is almost inconceivable that decisions on a question so frequently occurring during administration should not have been quoted. On the other hand the commentary on Indian Article 120 (S.S. Art. 97) contain as I shall show later, numerous cases concerning status in similar circumstances.

This Article 99 (Ind. Art. 123) would doubtless be the proper Article to be applied to the claim contained in clauses 2 & 3 of the statement of claim if claim I were upheld; but I hold that it is not the proper Article to apply to the claim in clause 1 for a declaration of status as a lawful widow.

Article 100 reads: "To establish a periodically recurring right." Rustomji in his commentary on the corresponding Indian Art. 131 at page 637 states: "Periodically Recurring Right.—'A perpetual right' is not a *periodically* recurring within the meaning of Article 131. The mere fact that sums of money are paid periodically does not make the right one that periodically recurs. The right is always there but it is only exercised at such times as the sums fall due." On page 639 it is stated "To establish" Consequential Relief.—In Madras the view has been taken that Article 131 is restricted to cases where consequential relief is asked for by virtue of the periodically recurring right and that where the suit is merely to declare the right (and no consequential relief is sought) the Article applicable is 120 (and not 131)." On the same page 9 lines from the bottom it is stated: "Article 131 has no application to a suit where the claim is for the establishment of a periodically recurring right but for remuneration arising from the right itself. The plaintiffs instituted a suit for the recovery of certain dues which they claimed to be payable to them as remuneration in respect their hereditary services as *dwaris* of a certain temple. The claim covered a period of thirteen years before the institution of the suit. *Held*: (a) That the suit was not governed by Article 102 (For wages not otherwise expressly provided for) in as much as the plaintiffs were not entitled to regular recurring wages but merely to certain fees by way of emoluments attaching to a hereditary office. (b) That it was not governed by Article 131 as it was not a suit to establish a periodically recurring right, but (c) That it was governed by the residuary Article 120." On page 640, ten lines from the bottom the same Article states: "Declaratory suits—Suit to declare as illegal the levy of quit rent; Article 120 (and not 131) applied . . . . . Suit to declare that plaintiff as *Dharmakarta* of a religious institution is entitled to receive direct from Government a certain *tasdik* amount payable annually is within Article 120 (and not 131)." These extracts may not appear quite conclusive and indeed certain of the Indian decisions appeared to be contradictory but running through all these comments and decisions a clear line of division is distinctly noticeable. viz. between a suit brought for a declaration of status or of an indivisible right once and for all to one payment or to a series of recurring payments, and a suit in the nature of a consolidation of a number of suits each for a yearly or recurring payment some of which it is conceivable might be refused for reasons unconnected with limitation, whilst the others might be granted. If the present monetary relief sought had been for the corpus i.e. for a lump sum payable under the intestacy, Article 100 could not have been considered, but the difference between that case and the present one is merely accidental and not inherent. I therefore hold that the claim for this declaration is a claim for a perpetual and indivisible right and that Article 100 does not apply.

Defendant No. 5 has submitted that Art. 97 (suit for which no period of limitation is provided elsewhere) as the appropriate Article specially applicable. As this is merely a residuary article no strict interpretation is possible. All that can be done is to examine in as a great a detail as possible the nature of the suits that have been held to fall within its scope. For this purpose I would refer to Rustomji's commentary on the corresponding Indian Article No. 120 pp. 581 etc. Certain of the cases cited appear to bear a close resemblance to the present case whilst in others the resemblance may be remote, but I have considered it advisable to include them all in order to show the extended application this

article has received in practice. Moreover all the cases cited appear to have one point in common: Each is for a declaration of a certain status or of a certain right as a necessary preliminary to a claim to certain property or other advantages which would naturally follow such declaration. RUSTOMJI Page 583, 1st line "A suit by plaintiff (in possession) for declaration of his title to immoveable property is within Article 120, and time runs when the defendant did the *first* act prejudicial to the plaintiff's title.....If the declaration prayed for is merely *ancillary* to the main relief sought the suit is not thereby governed by article 120." RUSTOMJI, Page 583. (4th line from above). "Suit for correction of entry on Record of Rights; Article 120 applied. Suit for possession of certain trees and for correction of entry in the Revenue papers, the defendant being there erroneously recorded as the planter and possessor of such trees; Article 120 applied." RUSTOMJI, Page 584 (1st line): "The Courts are in effect agreed that Article 120 applies to declaratory suits in respect of wrong entries in Revenue Records." Page 587, "Declaratory Suits; Other Cases; Suit for a declaration of right to moveable property:, Article 120 applied. Suit to declare that defendant is merely plaintiff's *benamidar* of property bought or leased in Defendant's name; Article 120 (and not 91) applied .....Vendee's suit for a declaration of his right to have the purchased property registered in his name in the Revenue Records is within Article 120 (and not Art. 144) ..... Suit for declaration that a marriage ceremony did not create the status of husband and wife between the parties; Art. 120 applied.

The circumstances in none of the above cases approximate closely to the condition of the present case and they are merely quoted to illustrate the extended application which Article 97 (Indian Article 120) has received in practice. I shall now however quote two Indian cases the circumstances of which appear closely to resemble the circumstances of the present case and in both of which Indian Article 120 was applied:—

Ravji Valad Mahadu Patel (def. Appt.) v. *Sukuji Valad Kaloji & another*, (1909) I.L.R. 34 Bombay 321.

Plaintiffs who were cousins sued for a declaration that they and not the defendant were the heirs to the Patilki Vatan of their uncle Ganapati Hari. The plaint alleged that Ganapati had died 13 years previously and that defendant fraudulently representing himself to be his heir, got his name entered as such in the Vatan register. Plaintiff asked for a declaration of heirship. Defendant *inter alia* pleaded that the suit was time barred. The District Judge in his judgment on appeal said "The only remaining question is that of limitation. The suit clearly falls under Article 120 of the Limitation Act of Appeal said: "With regard to the point of limitation we agree with the view taken by the learned District Judge."

I.L.R. 15, Row 422. On further appeal the Court

Pratap Singh alias Raja Ariandras (Deft. Appt.) v. *Raja Dattaji Rao*, (1919) 54 I.C. 300.

The plaint filed in this suit was as follows:—

(a) That it may be declared that the defendant in this suit is no son at all born of the loins of the late Raja Rajirao Mansingrao, that he is not the true heir, that he has been put falsely as heir and that he has no right at all to remain on the record of the Civil Suit No. 3 of 1905 on the file of this Court.

(b) That it may be declared that plaintiff is the true heir of Raja Rajirao Mansingrao and that after him he is entitled to have his name entered in Suit No. 3 of 1905 on the file of this Court as Defendant in his capacity as the true heir and legal representative of the late Raja Rajirao Masingrao.

Defendant raised the plea of limitation. The Court of first instance declared that the defendant Anadrao is not a son born of the loins of the late Raja Rajirao and that the plaintiff is the heir to him. Defendant appealed and the judgment on appeal was as follows:—

> If the suit could have been regarded as one for possession then it would not be barred by limitation as such a suit would be governed by Article 141.....The suit must be regarded as one for a declaration to which Article 120 of the Limitation Act applied.

Consequently in the absence of any convincing argument that any other special article I hold that Article 97 is the appropriate Article applied and in view of the decisions above quoted here and so that defendant's plea of limitation is good.

Certain other subsidiary pleas in connection with this main plea of limitation have been made which can be dealt with shortly. One plea was insanity. There are no clear proofs whatsoever that plaintiff was insane at any time but there are certain suggestions or scraps of proof that she was mentally unbalanced about the year 1918. There is no suggestion whatsoever that she was mentally unbalanced at the time of this cause of action accrued. The provision here applicable is Section 6 of the Limitation Ordinance which commences: "If a person entitled to institute a suit is at the time from which the period of limitation is to be reckoned, a minor, or an idiot etc." The important words are:—"Is at the time from which the period of limitation is to be reckoned" i.e. for the plea to be available such

disability must exist at the time when limitation commences to run. No subsequent disability will be of any avail. The commentary on page 68 of Rustomji on the corresponding Indian Section 6: "Section refers to Initial not Subsequent Disability," makes this clear. There is no suggestion that Plaintiff was under any mental disability, in 1915 or 1916 (I shall deal with the question of exact date later), when time began to run and so subsequent disability, even if fully proved would stop time running. The other subsidiary pleas are those of poverty and ignorance. Now I propose to deal with the alleged fact of ignorance not only for this but also for another purpose. Plaintiff was living with Lim Ah Chen in the family house in Hongkong during the whole course of the inquiry as to next of kin in Penang Suit 361 of 1912 and on the 15th December, 1915 Messrs. Hastings & Hastings the Solicitors for Lim Ah Chen and the other Hongkong trustees wrote by the instructions of the latter instructing Mr. Wright-Motion to put forward the claim on plaintiff's behalf in that enquiry. It is highly improbable that this was done without plaintiff's knowledge or that she was not informed of the result of the inquiry in respect of the claim of Tan Ah Loy which was so similar in all respects to her own claim. It is equally highly probable that it was because Tan Ah Loy's claim was not allowed that plaintiff did not put forward her own claim until Tan Ah Loy appeal to the Privy Council was successful.

If it were necessary therefore I would be pre pared to hold that in fact plaintiff was not ignorant but was well aware of all these facts. But this is not necessary. In Rustomji's commentary on the Indian Section 3 which corresponds to our section 3 at the bottom of page 11 the following passage occurs: "Ignorance Mistake or Hardship does not save limitation.—

> "After the prescribed period has elapsed the door of justice is closed and no plea of poverty, distress, ignorance or mistake can be of any avail."

Again on page 12, line 7; "Mere ignorance of the existence of the cause of action does not prevent running of the statute unless there has been a fraudulent concealment on the part of those invoking the benefit of the statute." There has been no question of fraudulent concealment so the plea of ignorance, as well as the plea of poverty, must fail. Another subsidiary question however arises. From what time does limitation run? Article 97 states that limitation runs from the time—"When the right to sue accrues." The judgment of the Court of Appeal declaring an intestacy was delivered in 1914 so it might well be argued that limitation ran from that date. The defendant however appear to have fixed on 28th December, 1915 when it was declared that a *t'sip* or secondary wife, in which capacity plaintiff is claiming, was not entitled to share. This date might be extended to the 10th January, 1916 when the Registrar's Certificate was confirmed by the Court. Rustomji in his commentary on the corresponding Indian Article 120 at page 584 *et seq.* gives two examples of special times in special cases: (1) From the time when the claimant's right came to his knowledge, (2) From the time of the first denial of the claimant's title. As I wish to deal with all possible times I shall also consider these: (1) Plaintiff's knowledge; I hold that Plaintiff knew that her claim was put forward by Lim Ah Chen and others by the letter of the 15th December, 1915 (as above related) and I now hold that she must have been informed of the decision of the Registrar of 28-12-1915 and of the Judge's confirmation of the 10th January, 1916 which declared that secondary wives generally (in which she was included) were not entitled to share, within a few months at latest from the delivery of such decision. (2) The first denial of Plaintiff's right: The declaration of intestacy was made in 1914 and thereafter the payments of the widows share consequent on such declaration were made yearly by the trustees. The first annual payment made within a year of such declaration from which Plaintiff was excluded was in fact a denial of Plaintiff's right of which I hold that she was cognisant—living as she did in the same house with Lim Ah Chen who duly received such share. It might therefore well be argued that limitatoin ran from one year after such declaration. The latest possible date available would be one year after the declaration that a *t'sip* would not be entitled to share i.e. 10th January, 1917. So the limitation period here expired on 10th January, 1923.—19 months before this suit was instituted. Consequently I hold that the plea of limitation is good and that this claim is barred by reason thereof.

Defendant No. 5 has also set up the plea of acquiescence and laches. I hold at once that there was no acquiescence in the technical active sense of that term, but the plea of laches i.e. mere passive in-action requires examination. Plaintiff in reply has relied on the following passage in Rustomji Page 37: "The defence of laches however is only allowed where there is no statutory bar. If there is a statutory bar Plaintiff is entitled to the full statutory period before his claim becomes unenforceable." These words appear to be taken almost *verbatim* from 13 Halsbury p. 168, para. 203. But then Rustomji proceeds. "The mere circumstance that the (Indian Statute, unlike the English Act) specially provides a period of limitation even for equitable remedies (e.g. specific performance, *vide* Art. 113) does not fetter the discretion of the Court in refusing such relief; but lapse of time short of that prescribed by the Act is not *per se* a valid

ground for refusing relief, except where such lapse of time is evident of an abandonment of the right on Plaintiff's part or where it has actually prejudiced the Defendant." It is thus clear that the general *dictum* first quoted does not receive such strict application in India as in England especially in reference to equitable claims, and that such claim may be disallowed on the ground of laches even although the whole period of limitation had not run. Examples taken at random from Rustomji are: page 161 "Laches and Acquiescence: When once the fraud has been discovered it is plaintiff's duty to claim relief promptly and he is not entitled to any definite period such as 12 years from the date when it was discovered." Again at page 384 *re* Art. 43 "(To compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets: . . . 3 years): Article 43 gives 3 years but the suit may be barred earlier on the ground of acquiescence and laches." But the passage in Rustomji which appears to settle the point beyond question as it deals with this particular kind of suit under this particular Art. 97 (Indian Art. 120) is given at page 587:—

"Declaratory suits: Laches and Acquiescence—Though a suit for a declaration may be within the law of limitation the Court has a very wide discretion to refuse the declaration (e.g. on the ground of laches or acquiescence), as the granting of declaratory relief is always in the discretion of the Court."

Therefore I hold that this general plea of Defendant No. 5 in bar of laches has no application in this suit. Halsbury Volume 13 at page 169 states: "Hence acquiescence depends on knowledge." This *dictum* presumably applies to laches also. I have found however that Plaintiff was in fact aware of her rights so her plea of ignorance is of no avail. The final question therefore is: Was there in fact laches? To constitute this there must be, as stated above both capacity and freedom and I interpret these terms in a wide sense. In Halsbury page 170 it is stated—"Poverty added to other circumstances is a material ingredient in deciding whether laches is to be imputed to a vendor who seeks to avoid a sale; but by itself it does not prevent a waiver of a right." And again a few lines lower: "Moreover there is no laches until the person entitled is ascertained." It is thus apparent that laches in every case is a question of circumstances including personality. This finding might rightly be made against a person of business experience of sufficient means and having easy access to legal advice; and yet be quite inappropriate as applied to a poor and totally inexperienced woman of failing if not deficient mental powers without access, at least after 1917 to any advice either legal or otherwise—such as approximately was the condition of the plaintiff. I have held that she knew that Lim Ah Chen and other trustees had put forward her claim in December, 1915 and that her claim had failed; inferentially, by the finding of the Registrar that a *t'sip* was not entitled to share. She doubtless also knew that the Tan Ah Loy litigation was still proceeding on this point. For part of the intervening time she was living on public charity. Under these distressing circumstances her action in deferring to take proceedings—even if she could have done so, until the decision of the Privy Council had clearly defined her rights appears to me not only not negligent but prudent—if unfortunately for herself her delay had not overstepped the bounds of limitation. In addition I would again refer to the passage above quoted from Halsbury: "Moreover there is no laches until the person entitled is ascertained." It might well be argued that plaintiff was ascertained as a person entitled to share until the decision of the Privy Council was given. On all these grounds I must agree with the learned trial judge in declining to hold the plaintiff was guilty of laches.

As above stated however I hold that this appeal should be allowed on the ground that plaintiff's claim is barred by limitation.

Appeal allowed.

Solicitors for 1st—4th Appellants—
Presgrave & Matthews.

Solicitors for 5th Appellant—
Hogan & Ivens.

Solicitors for the Respondent—
Adams & Allan.

[ORIGINAL CIVIL JURISDICTION]
MILLS, J.
November 22, 1933.

BAN AIK & COMPANY, ...Plaintiffs.
vs.
TEY YEW CHUAN trading as CHOP CHUAN THYE .....Defendant.

[SINGAPORE SUIT No. 803 of 1933]

Practice—Specially Endorsed Writ—Service out of jurisdiction—Contents of supporting affidavit—Civil Procedure Code, Ss. 3, 54, 106.

A Writ of Summons specially endorsed under section 54 of the Civil Procedure Code may be issued for service on the defendant out of jurisdiction. In an affidavit in support of the application for leave to issue such a writ it is essential under section 106 of the Civil Procedure Code to state, amongst other things, that, in the deponent's belief, the plaintiff has a good cause of action. Omission to testify to a good cause of action is a fatal defect.

APPLICATION before Mills, J. in Chambers for an order to discharge an order of Court dated the 20th day of October 1933 whereby leave to plaintiff was granted to issue the Writ of Summons in the above suit and to serve the same upon the defendant by substituted service at Muar a place out of the jurisdiction of the Court.